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Supreme Court of the United States

October Term 1978

No. 77-6673

ZACKARY C. BROWN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From the County Court of Law,
No. 2, El Paso County, Texas

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

The Attorney General of California is the chief law officer of the state, whose duty it is to see that the laws of the state of California are uniformly and adequately enforced. (Cal. Const., art. V, § 13.)

Among these statutes is California Penal Code section 647(e), which defines as a misdemeanor the conduct of a person "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The legal and constitutional significance of this California statute is substantially similar to that of the Texas Penal Code section under consideration in this case. The people of California thus have a vital interest in this Court's resolution of the constitutionality of Texas Penal Code section 38.02(a).

SUMMARY OF ARGUMENT

The due process challenges to the Texas statute and related enactments involve important questions of public policy. Insofar as these statutes are further challenged as violative of the Fourth Amendment, a further question of public policy is presented. In determining whether the intrusion authorized by the Texas statute is "reasonable", the degree of the intrusion must be balanced against the public good sought to be served. A brief examination of other cases demonstrates the intrusion in cases such as these is less substantial than those sanctioned in other areas, responsive to identical public concerns.

ARGUMENT

A REQUIREMENT OF IDENTIFICATION DURING THE COURSE OF A LAWFUL DETENTION IS REASONABLE

More than ten years ago this Court confronted a question raising "difficult and troublesome issues regarding a sensitive area of police activity . . .". (Terry v. Ohio (1968) 392 U.S. 1, 9.) That case, as this one, dealt with the necessarily swift actions, predicated upon his on-scene observations, of an officer on the beat. This Court recognized the necessity for evaluating

such actions against the Fourth Amendment's "general proscription against unreasonable searches and seizures." (Id. at p. 20.)

In Terry, of course, this Court affirmed the right of a police officer to conduct a reasonable search for weapons for his own protection when he had reason to believe he was dealing with an armed and dangerous individual, without regard to whether the officer had probable cause to arrest the individual for a crime. This conduct was determined to be reasonable within the meaning of the Fourth Amendment notwithstanding the fact such a protective search for weapons "constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." (Id. at p. 26.)

More recently, this Court has applied the principles set forth in Terry to the case of a police officer who had received information from an informant that a certain individual at a given location was carrying narcotics and a concealed weapon. (Adams v. Williams (1972) 407 U.S. 143, 144-145.) In affirming the right of the officer to search in those circumstances, this Court observed that the Fourth Amendment "does not require a policeman who lacks the precise level of information necessary for probable bable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (Id. at p. 145.) Further, in dealing with the question of reasonableness the court observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (Id. at p. 146.)

The act of the police officer in each of the above cases was constitutionally permissible despite the court's clear understanding that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." (Terry v. Ohio, supra, 392 U.S. at pp. 24-25.)

The intrusion in the present case, a requirement of identification upon request following a lawful detention, is far less severe. When border patrol officers reasonably suspect a particular vehicle may contain aliens illegally in the country, they may stop a vehicle and "question the driver and passengers about their citizenship and immigration status, and . . . ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." (United States v. Brignoni-Ponce (1975) 422 U.S. 873, 881-882.) This Court characterized such an intrusion as "modest", and observed that "[b]ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest." (Id. at p. 880.) In its analysis of the question, the court relied heavily upon Terry, supra, and Adams, supra. (422 U.S. at pp. 880-884.) An independent suspicion was first necessary for a stop and questioning, however, as the Fourth Amendment forbids "stopping vehicles at random" and making alien inquiries and also, of course, "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." (Id. at p. 884.)

Finally, in United States v. Martinez-Fuerte (1976) 428 U.S. 543, this Court determined that a brief detention of vehicles and occupants at routine checkpoints was permissible in light of the government interest sought to be served. (Id. at p. 562.) Such initial questioning in a stop, and further questioning following a secondary referral, were held to constitute an intrusion "sufficiently minimal that no particularized reason need exist to justify it . . .". (Id. at p. 563.)

This case involves, as did Terry, a sensitive area of police activity which has "never before been squarely presented to this Court." (Terry v. Ohio, supra, 392 U.S. at pp. 9-10.) It is clear the intrusion authorized by the Texas statute and related statutes is far less severe than the pat-down search authorized in that case. Amicus does not suggest, however, police officers should be empowered to conduct random demands for identification of citizens they encounter. Such a position would be inconsistent with the Fourth Amendment's clear intent "to prevent wholesale intrusions upon the personal security of our citizenry . . .". (Davis v. Mississippi (1969) 394 U.S. 721, 726.) Wholesale requirements of identification without reasonable suspicion were explicitly condemned in United States v. Brignoni-Ponce, supra, 422 U.S. at p. 884.

Instead, the Texas statute, like the California statute and related ordinances in other states, requires a lawful detention before a demand for identification may be initiated. The application of such a requirement is thus necessarily the converse of random. The identification requirement is particularized, and referrable in each

instance to objective factors supporting a forcible detention. There is thus no reason to fear the "dragnet" approach condemned in Davis v. Mississippi, supra.

Perhaps the closest analogy to the present question was presented in the recent case of Pennsylvania v. Mimms (1977) 434 U.S. 106. The question there presented for decision was the lawfulness of a police officer's ordering a driver out of an automobile following a lawful stop for a traffic violation. (Id. at pp. 107-108.) The court there again observed the test under the Fourth Amendment is the reasonableness of the particular governmental invasion, all circumstances considered, and the determination of reasonableness itself is dependent on a balance between the public interest and the individual's right to freedom from arbitrary interference. (Id. at pp. 108-109.)

Weighing the police officer's interest in his own safety against the minimal further intrusion of being ordered out of the automobile, this Court determined such a practice did not violate the Fourth Amendment. (Id. at p. 111.) In cases arising under the Texas statute, the similar California statute, or the Michigan ordinance at issue in a companion case to this one[1] there must exist,

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1. Michigan v. DeFillippo, 77-1680. The primary challenge to the Michigan ordinance is on due process grounds, which matters are covered in the Brief of Amicus Curiae State of California in Support of Petitioner in that case.

before a requirement of identification, adequate grounds for a forcible detention, precisely analogous to the detention for a traffic violation in Mimms, supra. Given the "seizure" inherent in a lawful detention, surely an identification requirement is no greater a further intrusion than a request to one stopped for a traffic violation to alight from his vehicle. In each type of case the underlying factors supporting the detention provide the particularized focus ensuring against random application of the minimal further intrusion occasioned, in these cases, by the requirement of identification.

It is clear an identification requirement, serving important governmental interests, is proper in cases where there is a reasonable suspicion, less than probable cause, of illegal activity. Because the identification requirement will necessarily come into play in a particularized fashion, following the existence of factors supporting a forcible detention, and itself is a far more modest intrusion than a "severe, though brief" search, it is consistent with the Fourth Amendment's requirement such intrusions be reasonable.

Respectfully submitted,

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